STATE OF MICHIGAN

IN THE SUPREME COURT

PRELIMINARY RESPONSE OF THE WHITE LUNG ASSOCIATION AND ASBESTOS PLAINTIFFS REPRESENTED BY GOLDBERG, PERSKY, JENNINGS & WHITE, P.C. TO PETITIONS TO ESTABLISH A STATEWIDE INACTIVE ASBESTOS DOCKETING SYSTEM

Submitted by:

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The White Lung Association[1] and Plaintiffs represented by Goldberg, Persky, Jennings & White, P.C.[2] (Collectively, "Respondents"), through their undersigned counsel, preliminarily respond to the Petitions filed by some 55 asbestos defendants ("Defendants") and the Michigan Chamber of Commerce (collectively, "Petitioners"), as follows:

Introduction

Petitioners propose that this Court adopt a rule that would clear asbestos dockets by requiring claimants with asbestosis to establish, *inter alia*, that scarring in their lungs has created a restrictive impairment that has left them with abnormally low lung capacity.

In considering this proposal, it is important to remember that Defendants are not without fault for their current predicament. Plaintiffs have alleged, and stand ready to prove, that each Defendant was negligent in exposing tradesmen and others to toxic asbestos dust. Many of the Defendants had actual knowledge of the dangerous

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[1] The White Lung Association is a national, non-profit asbestos victims' organization with headquarters in Baltimore, Maryland. Since its formation in 1979, the White Lung Association has represented the interests of asbestos victims through public education and advocacy, including submission of *amicus curiae* briefs in numerous court cases. The White Lung Association wishes to participate in the present proceeding to vindicate the important principle that all persons injured by exposure to asbestos should be afforded a right of redress against responsible tortfeasors through the ordinary course of law.

[2] The law firm of Goldberg, Persky, Jennings & White, P.C. represents some 1,500 plaintiffs with asbestos claims pending in Michigan courts - which is believed to constitute a majority of all such cases.

propensities of asbestos, and yet they sold or used asbestos-containing products without providing any warning or protection to those working in the vicinity of the use. Now, Petitioners are asking for a form of judicial dispensation, relieving Defendants of responsibility for all but the most serious injuries caused by their tortious conduct.

Respondents submit that such a sweeping limitation of access to justice should not be entertained by this Court - or indeed by any governmental body - without a searching inquiry into the pertinent facts and law, which should include an opportunity for interested persons to discover, present, challenge and controvert evidence, and to present written and oral argument. Respondents believe that upon inquiry it will become clear that Petitioners' proposal must be rejected, because: (1) the proposal is based upon unsubstantiated factual premises; (2) imposition of an injury threshold would amount to substantive lawmaking; (3) denial of a remedy to injured plaintiffs would be unconstitutional; and (4) unilateral adoption of an inactive docket would divert resources from Michigan residents to residents of other states.

Argument

1. Petitioners' request is based upon unsubstantiated factual premises.

First, there is no crisis in administration of asbestos cases in Michigan courts. The number of asbestos filings in Michigan is stable and actually small, relative to other states. Each of the jurisdictions that has tried a registry or split docket or the like has far, far more filings and a far, far greater backlog of pending cases. New filings in Michigan's busiest asbestos docket, Wayne County, have been limited to a number determined by the Honorable Robert J. Colombo, Jr., who concluded after careful consideration that an inactive docket is not warranted. Moreover, the administrative

burden imposed by these cases is rendered more manageable by a substantial decline in the overall rate of tort filings in Michigan during the last decade.[3]

Judge Colombo's conclusion that the system is working is empirically supported by the fact that all asbestos cases in Michigan are routinely resolved by settlement as they come up for trial, so that there is no burgeoning backlog. Defendants assert that they have "little choice but to settle", because multiple cases are scheduled at the same time. However, having failed to try even one single asbestosis case to verdict in about two decades of litigation, Defendants should not be heard to complain the they need extraordinary judicial intervention because they cannot manage to try 100 cases at a time. Michigan's exemplary record of resolving cases by settlement should be recognized as the success it is. Parties on both sides are able to agree upon case values by applying historically established valuation standards to the evidence of exposure and injury in each particular case. If Defendants believe that the values are too high, or that some plaintiffs are not injured at all, they remain free to try some cases in order to establish different valuation standards going forward. That not one of the Defendants has elected to try an asbestosis case in many years bespeaks an efficient system for case resolution, rather than a crisis.

Second, the asbestosis victims whose claims would be shelved under Petitioners' proposal are injured. Plaintiffs were not merely exposed to asbestos, with a resultant increased risk of sustaining injury in the future. Rather, each affected Plaintiff has

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[3] *See* National Center for State Courts, *Tort and Contract Caseloads in State Courts*, http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Tort_Contract.pdf (2002) (showing 38% decline in tort filings per 100,000 population in Michigan between 1992 and 2001).

been diagnosed with asbestosis, a serious, debilitating, progressive, permanent disease that damages the function and reduces the capacity of the lungs. Each Plaintiff therefore has sustained both "injury" and "harm" in the contemplation of the law. *See* Restatement (Second) of Torts § 7 (1965) (defining "injury" as "the invasion of any legally protected interest", and "harm" as "loss or detriment . . . of any kind"). Indeed, this Court has expressly recognized that asbestosis is "an injury caused by exposure to asbestos" for purposes of accrual of a cause of action. Larson v. Johns-Manville Sales Corp., 427 Mich. 301, 315, 399 N.W.2d 1, 18 (1986). Moreover, Petitioners' proposal to toll the statute of limitations for affected claims constitutes a tacit admission that the claimants have sustained legal injury, as those who are not yet injured have no need of tolling. *See, e.g.*, Connelly v. Paul Ruddy's Co., 388 Mich. 146, 151, 200 N.W.2d 70, 72 (1972) ("Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run.").

A Pulmonary Function Test ("PFT") is not generally administered to healthy patients. Consequently, only in a very rare case would a patient diagnosed with asbestosis have a baseline measurement from which to determine the precise extent of impairment of lung function or capacity. Instead, damages must be determined ad hoc, often based upon testimony of the Plaintiff and his family concerning former activities foregone due to asbestosis.

The proposal advanced by Petitioners makes no attempt to ascertain the existence or extent of an individual's actual loss of pulmonary function; rather, it requires a showing of "functional" impairment, which is identified by a present lung capacity "below the lower limit of normal", without regard to the subject's pre-disease lung capacity.

Because 80% of average lung capacity is considered "normal", a plaintiff who previously had normal lung capacity may lose up to one-fifth of his pulmonary function, and one who previously enjoyed abnormally high capacity may lose over one-third, without being considered impaired under Petitioners' proposal. Plaintiffs who have suffered any loss of function are injured, in fact and in law, even if they still retain enough of their former capacity to function at the "lower limit of normal".[4]

Third, cutting off the claims of less severely injured plaintiffs would not increase recoveries by those with mesothelioma or other cancers. This Court should not accept uncritically Petitioners' assertion that by preserving Defendants' resources that would otherwise go toward defense and settlement of asbestosis claims, their proposal would result in enhanced recoveries for asbestos-related cancer claims. Generally, asbestos cases are settled as they are listed for trial. There is no great backlog of cancer cases, and all such cases are settled in due course for amounts acceptable to the parties on both sides. The likely result of curtailing Michigan asbestosis claims will not be a sudden increase in payments for Michigan cancer claims, but rather a mere diversion of Defendants' resources to defend and settle asbestosis cases in other states that continue to list such cases for trial.

The foregoing summary reflects Respondents' view of the factual predicates underlying Petitioners' proposal. Respondents believe that if the Court is inclined to consider adoption of Petitioners proposal or some variant thereof, Petitioners should be

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[4] Moreover, because the proposed standard has been set to attain a 95% confidence level taking into account the PFT's margin of error, it is statistically inevitable that a substantial number - about 5% - of plaintiffs whose actual impairment meets Petitioners' heightened standard will be mis-classified as unimpaired, and thus deprived of a remedy.

put to their proof, and Respondents and other interested parties should be afforded an opportunity to test and controvert that proof. Respondents are confident that the allegations which purport to justify Petitioners' proposal cannot withstand scrutiny.

2. Adoption of an injury threshold would amount to substantive lawmaking.

Recognizing that substantive lawmaking is not the proper province of this Court, Petitioners attempt to present their proposal as merely procedural, emphasizing peripheral aspects such as pretrial consolidation and tolling of the statute of limitations. However, the heart of Petitioners' proposal is the alteration of the substantive elements of an asbestos claim through imposition of a heightened, particularized, substantive threshold standard for compensable injury.

Petitioners concede that court rules may not modify substantive law, and that under this Court's precedent, a rule is substantive rather than procedural unless "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified." McDougall v. Shanz, 461 Mich. 15, 30, 597 N.W.2d 148 (1999), *quoted in* Defendants' Petition at 22 (internal quotation marks and citation omitted). Petitioners' proposal plainly fails this test. Rather than resolving litigation by "judicial dispatch", the proposal seeks to abrogate entirely a class of claims, in order to promote the substantive, legislative ends of conserving Defendants' resources and prioritizing among claims against those resources. *Cf.* O'Brien v. Hazelet & Erdal, 410 Mich. 1, 14-15, 299 N.W.2d 336, 340-41 (1980) (recognizing the "power of the **Legislature** to determine the conditions under which a right may accrue" and to "change the common law" by "extinguish[ing] common-law rights of action") (emphasis added).

3. Closing the courts to plaintiffs below a threshold injury level would violate the Due Process Clause of the United States Constitution.

Regulations that impinge upon a fundamental right are "presumptively invidious" and must be "precisely tailored to serve a compelling governmental interest." Plyler v. Doe, 457 U.S. 202, 216-17 (1982). The right of access to the courts has long been deemed fundamental. As long ago as 1215, this right was articulated in Chapter 29 of Magna Carta, which provided: "To none will we sell, to none will we deny or delay, right or justice." Magna Carta, c. 29 [c. 40 of King John's Charter of 1215; c. 29 of King Edward's Charter of 1297] (1225), *quoted in* Burkett v. Cunningham, 826 F.2d 1208, 1219 (3d Cir. 1987). Sir Edward Coke explained the effect of this guaranty as follows:

> [E]very subject . . . for injury done to him . . . , by any other subject, . . . without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.

Coke, The Second Part of the Institutes of the Laws of England 55 (Brooke, 5th ed. 1797), *quoted in* Klopfer v. North Carolina, 386 U.S. 213 (1967). In the seminal case of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, the Supreme Court observed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." The Court quoted Blackstone to the effect that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . [E]very right, when withheld, must have a remedy, and every injury its proper redress." *Id.* (citation omitted). The Marbury Court concluded: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* More recently, the Court has

repeatedly recognized the fundamental importance of the right of access to courts. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.").

In the present case, adoption of Petitioners' proposal would utterly deny injured but "unimpaired" Plaintiffs their right of access to the courts without providing them with any protection or remedy. Such a curtailment of a fundamental right requires strict scrutiny to assure that any limitation on court access is precisely and narrowly tailored to serve a compelling governmental interest, in order to avoid violation of the Fourteenth Amendment's Due Process Clause.

The Supreme Court has defined compelling state interests as "only those interests of the highest order." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). Examples of compelling interests include maintaining the tax system, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989), and protecting children's welfare, Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944). On the other hand, for example, interests advanced by the bankruptcy system are not compelling. In re Young, 82 F.3d 1407, 1420 (8th Cir. 1996). In the present case, the interests sought to be advanced by Petitioners' proposal - promoting efficiency and fairness in distribution of Defendants' limited resources to injured claimants - are essentially the same as those served by bankruptcy, and thus are not sufficiently compelling to warrant sacrifice of Plaintiffs' fundamental right of access to the Courts.

Even if this Court were to determine that Petitioners' proposal would somehow serve a compelling state interest, the proposal still would not survive strict

scrutiny because it is not narrowly tailored to serve its ostensible ends.

4. Unilateral adoption of an inactive docket would merely divert resources from Michigan residents to residents of other states.

Asbestos settlements follow a consistent pattern in other states, as in Michigan: Cases are settled as they are listed for trial. Curtailment of asbestosis cases brought by Michigan residents will have no effect on the much greater volume of such cases brought in other jurisdictions, and thus will not stave off bankruptcy for financially troubled Defendants. Rather than conserving resources for future Michigan cancer cases, Petitioners' proposal would effectively transfer resources from less injured Michigan residents to less-injured residents of other states. The following observation of the West Virginia Supreme Court in explaining its adoption of a crashworthiness rule is equally applicable here:

> [A]s a court we are utterly powerless to make the *overall* tort system for cases arising in interstate commerce more rational: Nothing that we do will have any impact whatsoever on the set of economic trade-offs that occur in the *national* economy. And, ironically, trying unilaterally to make the American tort system more rational through being uniquely responsible in West Virginia will only punish our residents severely without, in any regard, improving the system for anyone else.

Blankenship v. General Motors Corp., 406 S.E.2d 781, 783 (W. Va. 1991) (italics in original).

Conclusion

For the foregoing reasons, this Court should decline to adopt Petitioners' proposal in any form; or in the alternative, should provide for plenary hearings (including an opportunity for discovery and presentation of evidence and argument) prior to consideration of Petitioners' proposal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Preliminary Response of the White Lung Association and Asbestos Plaintiffs Represented by Goldberg, Persky, Jennings & White, P.C. to Petitions to Establish a Statewide Inactive Asbestos Docketing System is being served upon counsel listed below by first-class United States Mail the 12th day of September, 2003, addressed as follows:

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